No. 5841

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

MICHAEL A. WHREN and JAMES L. BROWN, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE STATE OF CALIFORNIA, et al. AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici curiae are states that have a direct and substantial interest in ensuring that police officers as a matter of law have the discretion necessary to determine when to initiate a traffic stop in the performance of their duties. All of the states joined herein have statutes that govern when the police may initiate a traffic stop for vehicle code violations. Amici curiae support the government's contention that the federal Constitution does not compel exclusion of evidence lawfully seized during a traffic stop merely because the officer may have had a subjective belief the occupants of the car might also be involved in illegal activity for which no reasonable suspicion to stop existed.

SUMMARY OF ARGUMENT

The Constitution does not require exclusion of evidence lawfully seized during a lawful traffic stop. In a long line of cases beginning with *Scott v. United States*, 436 U.S. 128 (1978), the Court has consistently applied a purely objective test to Fourth Amendment search and seizure questions, and rejected inquiry into the officer's subjective intent. The proper focus of the inquiry is on whether the officer had a reasonable suspicion sufficient to justify the stop, not on the officer's subjective intent at the time the challenged action was taken.

Application of the reasonable officer test advocated by Petitioners has proved to be inconsistent and highly troublesome. A reviewing court is forced to determine the difficult question whether the stop conformed to "usual police practices." In granting en banc review on its own motion, the court in *United States v. Botero-Ospina*, 71 F.3d 783 (10th Cir. 1995), overruled the reasonable officer test based on usual police practices set forth in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), as being "unworkable" for that very reason.

The Court has fashioned a body of Fourth Amendment law that clearly circumscribes the permissible scope of an investigative detention. The rights of the traveling public therefore are not abandoned to the arbitrary exercise of discretionary police power, as advocates of the reasonable officer test contend. In light of these well-established limitations, the doctrine of the pretextual traffic stop properly may be viewed as a vestigial organ in the body of Fourth Amendment jurisprudence.

ARGUMENT

ADOPTION OF A PURELY OBJECTIVE TEST TO DETERMINE WHETHER A TRAFFIC STOP VIOLATES THE FOURTH AMENDMENT GUARANTEES AGAINST UNREASONABLE SEARCH AND SEIZURE IS CONSISTENT WITH THIS COURT'S PRIOR HOLDINGS

Petitioners ask the Court to adopt a reasonable officer test to determine the constitutionality of traffic stops. Such a test requires a reviewing court to examine the officer's subjective motivation for stopping the vehicle, even where a violation of the vehicle code has clearly occurred.[1] The test is unworkable, and

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1. The federal courts of appeals have generally taken two approaches when making a purportedly objective assessment of an officer's actions in making a traffic stop. One approach is called the purely objective, "could have," or legal authorization test. It asks only whether the officer could have stopped the vehicle for a suspected traffic violation. The other approach is called the modified objective, "would have," or reasonable officer test. It asks whether a reasonable officer would have made the stop in the absence of illegitimate motivation, and considers such factors as "the kind of duty the arresting officer was on at the time he made the stop; the words and actions of the officer both before and after he made the stop [citations omitted]; and the general police practice or routine for enforcing the violation for which the stop was made." *United*

contravenes a long line of established authority which focuses on an objective assessment of the officer's actions.

Amici curiae believe the constitutionality of a traffic stop should be determined by a purely objective test--one which asks whether the officer had a reasonable suspicion that the motorist violated a provision of the vehicle code, and which disregards the subjective motives of the officer or any existing police practices with regard to such stops. *United States v. Whren*, 53 F.3d 371, 374-375 (D.C.Cir. 1995).

A. The Court Has Consistently Applied A Purely Objective Test To Fourth Amendment Issues

The seminal case establishing an objective standard by which to measure the conduct of police officers in cases alleging a violation of the Fourth Amendment is *Scott v. United States*, 436 U.S. 128 (1978) (hereinafter "*Scott*"). In *Scott*, the defendant appealed from the denial of a motion to suppress evidence obtained as a result of a wiretap. In affirming the denial below, the Court observed, "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him." *Id.* at 137, 139 n.13 ("the motive with which the officer conducts an illegal search may have some relevance in determining the propriety of applying the exclusionary rule . . . . This focus on intent, however, becomes relevant only after it has been determined that the Constitution was in fact violated").

States v. Ferguson, 8 F.3d 385, 387 (6th Cir. 1993) (en banc).

The Court reasoned, "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify the action."[2] *Id.* at 138, citing *Terry v. Ohio*, 392 U.S.

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2. The Court's adoption of the objective standard was preceded by Justice White's similar analysis in his dissent in *Massachusetts v. Painten*, 389 U.S. 560 (1967), where the issue was "whether the fact that the officers were not truthful in telling respondent their intentions required that the evidence found by the policemen after they entered the apartment be barred from admission at respondent's trial as a 'fruit' of unlawful police conduct. . . . We might wish that policemen would not act with impure plots in mind, but *I do not believe that wish a sufficient basis for excluding, in the supposed service of the Fourth Amendment, probative evidence obtained by actions--if not thoughts--entirely in accord with the Fourth Amendment* and all other constitutional requirements. *In addition, sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources. . . .*" *Id.* at 565; italics added.

Justice White reiterated his analysis in a concurring and dissenting opinion in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), where he illustrated his reasoning with the following hypothetical: a warrant authorized a search for a particular incriminating item, the police "anticipated" discovery of a second item not mentioned in the warrant, and they inadvertently found a third item. *Id.* at 139. Justice White concluded, "in terms of the 'minor' peril to Fourth Amendment values" there was no difference between the incriminating items,

1, 21 (1968) (the reasonableness of a particular search or seizure must be "judged against an objective standard"); *see Brown v. Texas*, 443 U.S. 47, 52 (1979) ("When . . . a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits").

In subsequent cases, the Court, following the rationale in *Scott*, used an objective test and expressly rejected any inquiry into an officer's subjective motivation to determine whether police conduct violated the Fourth Amendment. For example, in *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983), involving a motion to suppress narcotics found on a ship, the Court summarily rejected as "incongruous" defendants' claim "that because the customs officers were accompanied by a Louisiana state policeman, and were following an informant's tip that a vessel in the ship channel was thought to be carrying marihuana, they may not rely on the statute authorizing boarding for inspection of the vessel's documentation." *Id.* at 584 n.3. Thus, the Court found it irrelevant that the inspection was motivated by a "hunch" the ship was smuggling marijuana or that the state police officer was present solely for that reason; what mattered was that the agents had a legitimate reason to be on the vessel at the time that probable cause to search for drugs developed.

In *Maryland v. Macon*, 472 U.S. 463 (1985), involving a motion to suppress the warrantless seizure of pornographic magazines, the Court stated, "[w]hether a Fourth Amendment violation has occurred 'turns on an objective assessment of the officer's actions in light of

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whereas the danger of destruction of the evidence is identical if the officers must depart and secure a warrant. *Id.* at 139.

the facts and circumstances confronting him at the time,' [citation omitted], and not on the officer's actual state of mind at the time the challenged action was taken." *Id.* at 471.

In *Graham v. Connor*, 490 U.S. 386 (1989), involving a personal injury suit arising from a traffic stop, the Court observed that a "test, which requires consideration of whether the individual officers acted in 'good faith'. . . is incompatible with a proper Fourth Amendment analysis," because it "puts in issue the subjective motivations of the individual officers, which our prior cases make clear has no bearing on whether a particular seizure is 'unreasonable' under the Fourth Amendment. . . . The Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts . . . have no proper place in that inquiry." *Id.* at 397-398.

In *Horton v. California*, 496 U.S. 128 (1990), the Court employed the objective test when revisiting the "plain view" doctrine.

> First, evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement. . . . [¶] Second, the suggestion that the inadvertence requirement is necessary to prevent the police from conducting general searches, or from converting specific warrants into general warrants, is not persuasive because that interest is already served by the requirements that no

> warrant issue unless it 'particularly describ[es] the place to be searched and the persons or things to be seized,' [citations and footnote omitted], and that a warrantless search be circumscribed by the exigencies which justify its initiation. [Citations].

Id. at 138-140.

In sum, the Court has consistently endorsed an objective standard to determine Fourth Amendment search and seizure issues. In every instance the Court has specifically rejected inquiry into the police officer's subjective state of mind or motive for his or her actions.

Application of the purely objective test, also referred to as the "could have" or "legally authorized" test, to the very narrow question whether the initial stop of a vehicle is justified would be in harmony with the holding in *Scott* and its progeny. The test asks only whether the officer had a reasonable suspicion that the motorist violated a provision of the vehicle code or was otherwise engaged in criminal activity at the time of the stop. The test disregards the subjective motives of the officer for stopping the vehicle or any limitations of existing police practices with regard to such stops. *See United States v. Whren*, 53 F.3d at 371 ("The objective 'could have' standard provides a more principled method of determining reasonableness").

The purely objective test more effectively promotes an objective assessment of police officers' actions, pursuant to *Scott* and its progeny. It "eliminates the confusion and inconsistencies," inherent in the application of the reasonable officer standard. *United States v. Ferguson*, 8 F.3d 385, 392 (6th Cir. 1993) (en banc), *cert. denied*, 115 S.Ct. 97 (1994). It also ensures that the validity of traffic stops is not subject to the vagaries of police departments' policies and procedures

concerning the kinds of traffic offenses of which they ordinarily do or do not take note. *Id.*

"The Fourth Amendment does not bar the police from stopping and questioning motorists when they witness or suspect a violation of traffic laws, even if the offense is a minor one." *United States v. Mitchell*, 951 F.2d 1291, 1295 (D.C.Cir. 1991). An officer who makes a traffic stop based on probable cause acts in an objectively reasonable manner. *United States v. Ferguson*, 8 F.3d at 390. The objective test does not require an officer's state of mind to perfectly match his legitimate actions. *United States v. Cummins*, 920 F.2d 498, 501 (8th Cir. 1990), *cert. denied*, 112 S.Ct. 428 (1991). Thus, when the police are doing "no more than they are legally permitted and objectively authorized" to do, the resulting stop or arrest is constitutional. *United States v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989), *remanded*, *affirmed* 925 F.2d 1064, 1065, (7th Cir. 1991), *cert. denied*, 112 S.Ct. 428 (1991).

The overwhelming majority of federal appellate courts has adopted the purely objective standard. *United States v. Botero-Ospina*, 71 F.3d at 787 (a traffic stop is valid if based on an observed traffic violation or on a reasonable articulable suspicion the violation has occurred); *United States v. Scopo*, 19 F.3d 777, 782-784 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 207 (1994) (legal authorization test ensures traffic stops are "not subject to the vagaries of police departments' policies and procedures"); *United States v. Ferguson*, 8 F.3d at 391 ("traffic stops based on probable cause, even if other motivations existed, are not illegal"); *United States v. Hassan El*, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1374 (1994) ("We adopt the objective test . . . that when an officer observes a traffic offense or other unlawful conduct, he or she is justified in stopping the vehicle under the Fourth Amendment"); *United States v.*

Cummins, 920 F.2d at 500 ("The [High] Court's language leaves little doubt that 'the officer's actual state of mind at the time the challenged action was taken' [citations] is of no significance in determining whether a violation of the Fourth Amendment has occurred"); *United States v. Trigg*, 878 F.2d at 1041 (the High Court's language dictates "a purely objective inquiry in evaluating the reasonableness of a particular police activity"); *United States v. Causey*, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc) ("so long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant and hence not subject to inquiry"); *United States v. Hawkins*, 811 F.2d 210, 212 (3rd Cir. 1987), *cert. denied*, 484 U.S. 833 (1987) ("The *Scott/Macon* principle [is] that a Fourth Amendment inquiry focuses on the objective facts known to the officer rather than the seizing officer's state of mind").

By adopting the purely objective test, the Court will adhere to the well-established rule, beginning with *Scott*, of relying on objective criteria to assess the constitutionality of police conduct.

B. <u>The Modified Objective Test, With Its Inquiry Into "Usual Police Practices," Has Proven To Be Impossible to Apply</u>

Under the modified objective test espoused by petitioners, the reviewing court must make a two-step inquiry. First, the court must decide whether a vehicle code violation occurred. If it did, the court must then determine whether the detaining officer was justified in stopping the vehicle under "usual police practices." *See United States v. Ferguson*, 8 F.3d at 387 (the "would have" test examines the traffic violation in terms of the arresting officer's duties at the time of the stop and the general police practice or routine for enforcing that

violation); *United States v. Millan*, 36 F.3d 886, 889 (9th Cir. 1994) (since stop of vehicle for cracked windshield was suggested by drug interdiction officer with no traffic-related duties, the stop was pretextual); *compare United States v. Whren*, 53 F.3d at 376 (since the officers observed the vehicle code violations, the court's inquiry "need go no further").

The difficulty of applying the modified test to traffic stops is illustrated by the experience of the Tenth Circuit, which adopted the modified or reasonable officer test nearly a decade ago in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), but which recently rejected it as "unworkable." *United States v. Botero-Ospina*, 71 F.3d at 786.

In *Guzman*, the court, relying on *United States v. Smith*, 799 F.2d 704 (11th Cir. 1986), adopted the reasonable officer test and focused on the usual practices of the state police in making traffic stops. The court held the inquiry should be whether the officer making the stop had "deviated from the usual practice" of the police officers in the state. *Id.* at 1517. The court reasoned, "in the absence of standardized police procedures that limit discretion," whether a motorist is detained and subjected to lengthy interrogation turns on no more than the officer's mood or the motorist's appearance. *Id.* at 1516; *see United States v. Hernandez*, 55 F.3d 443, 445 (9th Cir. 1995) ("we often find it helpful to determine whether the stop conformed to regular police practices," citing *Smith* and *Guzman*).

In light of the decision in *Guzman*, courts in the Tenth Circuit were forced to determine the meaning of "usual police practices." The problem was that several different meanings emerged. For example, in *Guzman*, the court defined usual police practices in terms of an entire state police force. *Id.* at 1518. In *United States v. Working*, 915 F.2d 1404, 1408 (10th Cir. 1990), and

United States v. Harris, 995 F.2d 1004, 1006 (10th Cir. 1993), however, the court defined usual practices as common practices of particular officers. And in *United States v. Fernandez*, 18 F.3d 874, 877 (10th Cir. 1988), the court defined usual practices by a particular unit of the highway patrol.

Given the conflicting meanings of the phrase "usual police practices," there was little if any consistency in the application of the reasonable officer test.[3] It was precisely for that reason that the Tenth Circuit, on its own motion en banc, overruled *Guzman* in *United States v. Botero-Ospina*, 71 F.3d at 787.[4] The court adopted the purely objective test, espoused by respondent here.

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3. A leading proponent of the reasonable officer test, with its reliance on standardized police practices, has recognized it would be "difficult to administer." See 3 W. LaFave, *Search and Seizure*, § 7.5(e) (3rd ed. 1996) at 592 ["a pretext rule (focusing not on motivation but on departure from established practice) is difficult to administer when it cannot easily be determined that there is an established practice against which to test the police conduct in a particular case"].

4. In *Botero-Ospina*, a Utah County Sheriff's Deputy stopped a swerving car to ensure the driver was not falling asleep or intoxicated. *Id.* at 785. During the stop, the driver's evasive answers led the officer to ask for permission to search the car, which was granted. *Ibid.* The officer found 74 kilograms of cocaine hidden in the car. *Ibid.*

The court affirmed the district court's denial of the motion to suppress because the officer had observed defendant "straddling the lane" and reasonably believed he might also be driving under the influence of alcohol, in violation of the state vehicle code. *Id.* at 788.

The court noted that test (1) more effectively promotes an objective assessment of police officers' actions, pursuant to the analysis in *Scott*; (2) eliminates the confusion and inconsistencies inherent in the application of the *Guzman* standard; (3) ensures that the validity of traffic stops "'is not subject to the vagaries of police departments'" policies and procedures concerning the kinds of traffic offenses of which they ordinarily do or do not take note; and (4) leaves to the state legislatures the task of determining what the traffic laws ought to be, and how those laws ought to be enforced. *Id.* at 788, *citing United States v. Ferguson*, 8 F.3d at 392. The court in *Botero-Ospina* concluded, "[t]ime has proven the *Guzman* standard unworkable . . . [and] its application has been inconsistent and sporadic." *Id.* at 786.

Only two courts, the Ninth and Eleventh Circuits, now adhere to the modified objective, or "would have" test. *See United States v. Hernandez*, 55 F.3d at 446 (reversed because no reasonable officer would have stopped defendant for illegal parking); *United States v. Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991) (reversed because reasonable officer would not have stopped defendant's vehicle).

Even so, the Ninth Circuit has expressed doubt and confusion about how to interpret the test. For example, in *United States v. Hernandez*, 55 F.3d at 445, the court noted other courts in the circuit had "found the case law confusing" when analyzing the reasonable officer test. *Id.* at 445, citing *United States v. Perez*, 37 F.3d 510 (9th Cir. 1994) ("Our circuit's caselaw has not been entirely consistent in the test it has applied to determine pretext") and *United States v. Millan*, 36 F.3d 886 (9th Cir. 1994) (same); *see United States v. Cannon*, 29 F.3d 472 (9th Cir. 1994) ("Devising appropriate and workable formulas for limiting police discretion has proved difficult, and circuit courts now conflict on the proper

standard for evaluating 'pretextual stop' claims"). The dissent in *Hernandez* reiterated that "our prior cases demonstrate some confusion about the proper test for determining whether a stop is pretextual." *Hernandez*, 55 F.3d at 445 (Wiggins, J., dissenting).

The uncertainty inherent in allowing the usual police policies and practices of individual communities or states, or the usual policies and practices of individual law enforcement bodies, or even of individual officers, to determine the scope and application of the Fourth Amendment under the reasonable officer standard requires that this Court establish a clear and consistent rule. Without such a clear and consistent rule, based, as we have urged, on an objective assessment of the officer's conduct, trial courts will be compelled to hold hearings in every case to determine what the usual police policies and practices are in any given situation, assuming they even exist. The difficulty in application of such a standard will continue. It will ensure a multiplicity of rules and resolutions of Fourth Amendment claims that will result in a body of Fourth Amendment law dependent entirely on the highly individualized determination of what constitutes adherence to, rather than departure from, the usual practice of the law enforcement body or individual in question. The result will be a body of Fourth Amendment law created in the trial court by the trial court, without regard to the inconsistency, and consequent arbitrariness, of resolution of Fourth Amendment claims. This Court will have thus effectively abandoned its determination of the proper application of the Fourth Amendment in an area of law that is perhaps unique in the breadth of its application.

Because of the need to determine in each case the relevant policies and practices, the "modified" objective test amounts to nothing more than a subjective test in disguise. The test in essence focuses the inquiry

on objective evidence of the acting officer's *subjective* state of mind. As the court in *United States v. Scopo*, 19 F.3d at 783, correctly observed, "the 'usual police practices' approach is not a wholly objective test, because it requires a reviewing court to look into the motivations and hopes of an arresting officer."

What the modified or reasonable officer test attempts to do is divine a reasonable officer's subjective motivation under similar circumstances. A significant factor in this determination is the arresting officer's allegedly invalid purpose, i.e., his or her subjective motivation. *See, e.g., United States v. Hernandez*, 55 F.3d at 447 (if a reasonable officer would have made the stop anyway, it is not pretextual); *United States v. Valdez*, 931 F.2d 1451 (officer testified he normally would not have stopped a car for the traffic violation); *United States v. Smith*, 799 F.2d 704, 710 (11th Cir. 1986) (not reasonable for officer to stop car for minor traffic offense).

Thus, although the reasonable officer test purports to be objective, the analysis is not so different from a purely subjective approach. As the court in *United States v. Ferguson*, 8 F.3d at 391, concluded, "we find it difficult to distinguish, for example, between the officer's subjective intent and the 'objective evidence' of the officer's actual interest in investigating the kind of offense for which he made the stop."

In short, adoption of the purportedly "objective" reasonable officer test, as petitioners urge the Court to do, would signify a clear break with a long line of Fourth Amendment cases, beginning with *Scott*, that have consistently held that an officer's actual state of mind does not determine the reasonableness of his or her actions. It would also ensure a vast and inconsistent body of Fourth Amendment law, not only from jurisdiction to jurisdiction, community to community, but

even from officer to officer. The test espoused by petitioners must therefore be rejected.

C. The Fourth Amendment Adequately Protects Against Potential Abuse Arising From A Traffic Stop

The whole notion of when a traffic stop is or is not "pretextual" hinges on the subjective intent of the officer for stopping the vehicle. Since *Scott* and its progeny have "cast substantial doubt upon the continued validity of the subjective intent approach," *United States v. Trigg*, 878 F.2d at 1041, amici curiae believe the time has come for the Court to repudiate the doctrine of pretextual traffic stops. The same objective standard that is used to determine the constitutionality of police conduct in other Fourth Amendment areas should now be applied to traffic stops. *See United States v. Trigg*, 925 F.2d at 1065 ("We recognize that such an approach virtually eliminates the concept of a 'pretext arrest'. . ."); *United States v. Botero-Ospina,* 71 F.3d at 795 (Lucero, J., dissenting) ("The pretext doctrine is expressly abandoned"). No exception should be made for traffic stops because of the purported danger that "thousands of everyday citizens who violate minor traffic regulations would be subject to unfettered police discretion as to whom to stop." *United States v. Cannon*, 29 F.3d 472, 475 (9th Cir. 1994), *citing United States v. Guzman*, 864 F.2d at 1516.

The danger is overstated. The court in *Botero-Ospina* found an ordinary traffic stop was analogous to an investigatory detention under *Terry v. Ohio*. *United States v. Botero-Ospina,* 71 F.3d at 786. The court also noted that the concerns regarding "the arbitrary exercise of discretionary police power" were addressed by "the vast body of law" resulting from the second prong of the

Terry analysis, i.e., "whether the police officer's actions are reasonably related in scope to the circumstances that justified the interference in the first place." *Id.* at 788. The court concluded, "well-developed case law clearly circumscribes the permissible scope of an investigative detention," and thus a stop justified by an observed traffic violation, but "motivated by a desire to engage in an investigation of more serious criminal activity," is "circumscribed by *Terry*'s scope requirement." *Ibid.* That conclusion is well-founded.

The notion of pretextual stops and arrests originated in *United States v. Lefkowitz*, 285 U.S. 452, 467 (1932), in which the court stated that "[a]n arrest may not be used as a pretext to search for evidence." The concerns expressed in *Lefkowitz* are no longer with us. Over the next sixty years, the Court enhanced the protections against unreasonable search and seizure in general. *See Chimel v. California*, 395 U.S. 752 (1969) (limited the scope of a premises search incident to an arrest); *Payton v. New York*, 445 U.S. 573 (1980) (prohibited warrantless home entry to effectuate an arrest); *Steagald v. United States*, 451 U.S. 204 (1981) (prohibited warrantless home entry to arrest a non-occupant).

The Court also enhanced the protections against unreasonable search and seizure during traffic stops. In *Delaware v. Prouse*, 440 U.S. 648, 663 (1979), the Court limited the use of random vehicle stops to enforce compliance with auto registration and safety laws. In *Michigan v. Sitz*, 496 U.S. 444, 451 (1990), the Court upheld the use of sobriety checkpoints to investigate drunk driving since detention of particular motorists for field sobriety tests may require individualized suspicion. In *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975), the Court limited the use of roving patrol stops

absent a reasonable, articulable suspicion the vehicle contained aliens.

Once a vehicle is stopped the officers do not automatically have the right to search it or its occupants. Although officers may rightfully observe from their vantage point anything in plain view, the Court has permitted a search of the vehicle only if one of several additional factors arises. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (officers must have a reasonable and articulable suspicion the occupant is dangerous and may gain control of a weapon before they could search the passenger area of a car); *New York v. Belton*, 453 U.S. 454, 462 (1981) (defined the scope of a search of the passenger area of a car incident to a lawful arrest of the occupants of the car); *United States v. Ross*, 456 U.S. 798, 800 (1982) (officers must have probable cause to believe the vehicle contained concealed contraband before they could search it and its contents); *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976), and *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (officers must follow standard impound and inventory procedures in order to search the vehicles).

A lawful traffic stop is not, as proponents of the reasonable officer test argue, a carte blanche for an officer to engage in an unjustified search. Having stopped the vehicle for a traffic violation, the officer may thereafter proceed only in a manner consistent with established limitations on the exercise of his authority. Moreover, as the court in *United States v. Scopo* made clear, "[t]hough the Fourth Amendment permits a pretext arrest [or stop], if otherwise supported by probable cause, the Equal Protection Clause still imposes restraint on impermissibly class-based discriminations." *United States v. Scopo*, 19 F.3d at 786 Newman, C.J., conc.

In short, the Court has so refined the protections regarding searches incident to arrest and detention under the Fourth Amendment that the pretext doctrine has lost much of its urgency. It is nothing more than a vestigial organ in the body of Fourth Amendment analysis.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals for the District of Columbia Circuit should be affirmed on the ground the officers lawfully stopped petitioners' vehicle for observed vehicle code violations.

Respectfully submitted,

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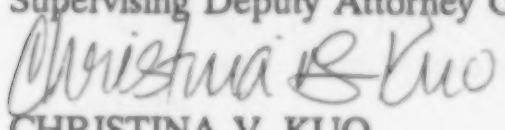

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March 14, 1996

AMICUS CURIAE

BRIEF

No. 95-5841

(13)

IN THE SUPREME COURT

OF THE

United States

OCTOBER TERM, 1995

MICHAEL A. WHREN AND JAMES L. BROWN
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent,

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CALIFORNIA DISTRICT ATTORNEY'S ASSOCIATION, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Appellate Committee of the California District Attorney's Association

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INTRODUCTION

The amicus curiae, California District Attorney's Association of California, respectfully submits this brief in support of Respondent, United States of America, pursuant to Rule 37, Section 4 of the Rules of the Supreme Court of the United States. Consent to file has been granted by Counsel for Petitioners and the Respondent. Letters of Consent of all parties have been filed with the Clerk of this Court, as required by the Rules.

STATEMENT OF INTEREST

The Appellate Committee of the California District Attorney's Association is a committee created by the District Attorneys of California to utilize and coordinate the resources of District Attorney's Offices throughout the state for the purpose of presenting their views in cases which have major statewide impact upon the prosecution of criminal offenses. The issue of what standard of review must be used when courts are presented with a claim of an alleged pretextual traffic stop is an issue that confronts prosecutors across our state every day. It is important that the standard adopted be one that provides law enforcement with practical and workable guidelines. The proper resolution of this case is, therefore, a matter of deep concern to the CDAA and its members.

SUMMARY OF ARGUMENT

The objective approach to alleged pretext traffic stops taken by the court of appeal is easily understood and applied. If a stop is supported by objective facts establishing a requisite level of suspicion, no further inquiry is required.

In contrast, the "would have" approach, advocated by petitioner and allied amici, is unworkable. It requires that courts go beyond deciding whether there were sufficient facts supporting the officer's belief that a crime was committed. It requires courts to venture into the realm of deciding whether a hypothetically reasonable officer "would have" made the stop in the absence of some purpose other than to investigate the offense that provided the objective justification for the stop.

Application of this approach has been inconsistent. Courts do not agree on what factors may be considered in assessing the reasonableness of a stop under the "would have" test. Often, courts purporting to look at whether an officer was following routine or usual practices do not, in fact, do so. Other courts purporting to apply the test, actually apply a traditional reasonable suspicion analysis. While courts adopting the "would have" test claim it is an objective test, they often take into consideration factors bearing on the subjective motivation of the investigating officer. Even courts which agree that the focus should be on whether the officer followed routine or usual practices, disagree on the appropriate reference group for determining what is the routine or usual practice. Ultimately, adoption of the test will generate far more confusion than conclusion.

To the extent the "would have" test requires standardized procedures for each and every of the myriad of traffic regulations, it is unrealistic. Requiring police departments to draw up such standardized policies would be detrimental to effective law enforcement.

The "purely objective" approach is consistent with the objective approach taken by this Court in assessing the

constitutionality of searches or seizures in analogous contexts. The "would have" test is inconsistent with the objective approach because, at bottom, it is concerned with the subjective motivations of police officers.

The "purely objective" approach is consistent with the approach this Court adopted in *Terry* when assessing limited seizures. The "would have" test requires this Court to add a new unnecessary level of scrutiny to the *Terry* analysis.

The "purely objective" approach satisfactorily limits an officer's discretion in the manner implicitly approved by this Court in *Delaware v. Prouse*, 440 U.S. 667 (1979) and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). The "would have" test requires this Court to put the kind of limits on an officer's discretion that this Court has saw fit to impose only when allowing searches or seizures that need not be supported by a requisite level of criminal suspicion.

Police discretion is also restricted by the fact that a traffic stop is a limited intrusion, the scope of which is carefully circumscribed. Legislatures also are in a position to limit police discretion where there is a fear of potential abuse.

The "would have" test cannot logically be limited in application to minor traffic stops. Hence, the test has the potential to force an unprecedented and unwarranted change in all Fourth Amendment jurisprudence. Moreover, it is unnecessary to adopt the "would have" test in order to prevent discriminatory enforcement of the law.

ARGUMENT

I.

THIS COURT SHOULD USE A "PURELY OBJECTIVE" APPROACH WHEN CONSIDERING ALLEGATIONS THAT A DEFENDANT WAS STOPPED FOR PRE-TEXTUAL REASONS

A. The "Purely Objective" Approach Adopted by the Court of Appeal is Easily Applied: The Alternative Approaches Advocated by Petitioner and Allied Amici Are Not.

1. The "Purely Objective" Approach

We ask this Court to adopt the following standard for assessing the constitutionality of an alleged pretextual traffic stop:

> "a traffic stop is valid under the Fourth Amendment if the stop is based on an observed traffic violation or if the police officer has reasonable articulable suspicion that a traffic or equipment violation has occurred or is occurring."

United States v. Botero-Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (*en banc*). Under this standard, the subjective intent of the investigating officer, the general practice of the police department, and the general practice of the investigating officer are all irrelevant. The seizure remains valid even if the officer would have ignored the traffic violation but for any suspicions unrelated to the traffic violation. *See United States v. Scopo*, 19 F.3d 777, 784 (2nd Cir.), *cert. denied*,

115 S.Ct. 207 (1994); *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir.) (*en banc*), *cert. denied*, 115 S.Ct. 97 (1994).

In adopting this standard, the court of appeal referred to it as the "could have" test. *United States v. Whren*, 53 F.3d 371, 376 (D.C. Cir. 1995). The standard has also been referred to, inter alia, as the "authorization" approach or the "purely objective" test. *See, respectively, United States v. Scopo*, 19 F.3d at 784; *United States v. Hassan-El*, 5 F.3d 726, 730 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1374 (1994).[1] Nevertheless, despite the difference in nomenclature, and some variation in the language used by courts in defining the approach, the difference is one of semantics. The end result is the same: if the stop is supported by the requisite level of suspicion, no further inquiry is required.

The "purely objective" approach is easily applied and understood. Either there *are* or there *are not* sufficient facts supporting the officer's belief that a violation of the law has occurred or is occurring.

2. The Approaches Advocated by Petitioner and Allied Amici

Petitioner and allied amici recommend that this Court reject a "purely objective" approach. They argue that this Court should adopt a version of what is commonly referred to as the "would have" test. *See*, *Petitioner's Brief on the Merits* at 32; *Brief of the American Civil Liberties Union as*

[1]Because the term "purely objective" approach most accurately characterizes the essence of the test, we adopt it for purposes of this brief. We decline to refer to the approach as the "could have" test because that designation conveys the erroneous impression that a stop can be justified by a post-stop determination that the officer could *theoretically* have stopped the suspect for a traffic violation, even though the officer did not notice the violation until after the initial stop was made. *See United States v. Ferguson*, 8 F.3d at 391.

Amicus Curiae (hereinafter "*ACLU Amicus*") at 15; *Brief of the National Association of Criminal Defense Attorney's* (hereinafter "*NACDL Amicus*") at 6-7. Most courts which use this approach have defined it in language similar to the following: "the proper inquiry . . . is not whether the officer *could* validly have made the stop, but whether under the same circumstances a reasonable officer *would* have made the seizure in the absence of the invalid purpose." *United States v. Valdez*, 931 F.2d 1448, 1450 (11th Cir. 1991).[2]

Similarity in definition, however, has not resulted in similarity of application. In contrast to the "purely objective" approach, it is difficult to put a finger on just what a court is supposed to do under the "would have" approach. A review of the cases in which courts have tried to apply the "would have" test reveals the amorphous nature of the test as well as the inconsistency in its application. *See United States v. Botero-Ospina*, 71 F.3d at p. 786. *See also United States v. Perez*, 37 F.3d 510, 513 (9th Cir. 1993) [using test but openly recognizing inconsistency with which it has been applied].

For example, many courts applying the "would have" test rely on their own intuitive sense of what is reasonable police work, regardless of whether any testimony concerning standardized procedures or usual practices has been elicited. *See*, *United States v. Perez*, 37 F.3d at 513; *United States v. Cannon*, 29 F.3d 472, 476 (9th Cir. 1994); *United States v. Betancur*, 24 F.3d 73, 77 (10th Cir. 1994); *United States v. Mans*, 999 F.3d 966, 968 (6th Cir. 1993), *cert. denied*, 114 S.Ct. 567 (1993); *United States v. Patterson*, 993 F.2d 121, 123 (6th Cir. 1993); *Thanner v. State*, 611 A.2d 1030, 1037, 93 Md.App. 134, 141 (Md. Ct.Spec.App. 1992); *State v. Whitsell*, 591 N.E.2d 265, 273, 69 Ohio App.3d 512, 524 (Ohio Ct.App. 1990); *State v. Smith*, 119 Utah Adv.Rep 837, 81 P.2d 879, 883 (Utah Ct.App. 1989); *Limonja v.*

[2]The test assumes that, in some instances, police will ignore their general obligation to enforce the law.

Commonwealth, 8 Va.App. 532, 539, 383 S.E.2d 476, 480 (Va. Ct.App. 1989), *cert. denied*, 495 U.S. 905 (1990); *State v. Bostic*, 637 So.2d 591, 594 (La. Ct.App. 1994); *Taylor v. State*, 111 Nev. 1253, 903 P.2d 805, 807-808 (Nev. Sup.Ct 1995); *State v. Turner*, 1994 Ohio App. Lexis 2792 at *9 (Ohio Ct.App. 1994).

Other courts adopting the "would have" test actually apply a *de facto* "reasonable suspicion" analysis. That is, they invalidate the stop as pretextual largely because there was insufficient evidence to create a reasonable suspicion of illegal activity. *See, e.g., United States v. Hernandez*, 55 F.3d 443, 446 (9th Cir. 1995) [pretext found because no right to detain defendant for illegally parking *outside* business district where car was parked next to several businesses]; *United States* v. *Millan*, 36 F.3d 886, 891 (Holcomb, J., concurring) (9th Cir. 1994) [stop for cracked windshield pretextual because cracked windshield not illegal and insufficient evidence damage created safety hazard]; *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993) [stop deemed pretextual where not objectively reasonable for officer to suspect driver intoxicated based simply on weaving within lane and failure to make eye contact with officer]; *Tarwid* v. *Georgia*, 184 Ga.App. 853, 854, 363 S.E.2d 63, 64 (Ga. Ct.App. 1987) [stop held pretext where driver, who had just received a warning citation by officer who reported no signs of intoxication, was stopped by another officer for traveling slightly *under* maximum speed limit].)

Some advocates of the "would have" test vigorously assert that the test does not require courts to examine the actual motives of investigating officer. Yet, at least one advocate of the "would have" test has admitted that "the standard requires the Court to give at least partial consideration to the officer's motives in making an arrest." *Crittendon v. State*, 899 S.W.2d 668, 679-680 (Baird, J.,

dissenting)[3]

Moreover, the factors considered by courts applying the "would have" test are often indistinguishable from the factors considered by courts which overtly adopt a subjective test. In *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968), one of the cases most commonly cited as using an openly subjective approach, the court relied upon the following factors in finding the stop pretextual: the defendant was under surveillance as a narcotics suspect; the officer admitted that the real reason for the stop was to search for narcotics; evidence that the officer did not normally make traffic arrests; evidence that no traffic citation was issued at the time of the arrest; and the delay between the initial observation of the violation and the stop. *Id.*, at 313-314. Identical, or functionally identical, factors are used by courts who subscribe to the "would have" approach. *See, e.g., United States v. Millan*, 36 F.3d at 889 [considering, inter alia, testimony of investigating officer that he had received training on how to use traffic stops to investigate other crimes and fact stop was suggested by officer from another agency with no traffic-related duties]; *United States v. Fernandez*, 18 F.3d 874, 887 n. 2 (10th Cir. 1994) [considering actual officer's lack of memory regarding a defendant's response as factor in finding stop pretextual]; *United States v. Lyons*, 7 F.3d at 976 [considering officer's actual behavior after stop in finding "the motivation for the stop was something other than (the defendant's) ability to drive"]; *United States v. Valdez*, 931 F.2d at 1451 [considering patrol officer's admissions he would not have made stop unless instructed by narcotics unit to do so]; *United States v. Harris*, 928 F.3d 1113, 1116 (11th Cir. 1991) [considering, inter alia, whether officer actually conducted investigation for DUI after stop];

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[3]On the other hand, one court purporting to apply the "would have" test has, in effect, applied a "purely objective" test. *See, e.g., Poindexter* v. *Commonwealth*, 16 Va.App. 730, 432 S.E.2d 527, 529 (Va. App. 1993).

United States v. Miller, 821 F.2d 546, 549 (11th Cir. 1987) [considering officer's admissions he would have made stop regardless of traffic violation and fact officer began pursuing driver before seeing traffic violation]; *United States v. Smith*, 799 F.2d 704, 710-711 (11th Cir. 1986) [considering, inter alia, whether officer began pursuit before seeing violation, whether officer made any attempt to investigate DUI after stop, and whether statements of officer on stand indicated officer not really concerned with traffic safety]; *State v. Newell*, 1995 Ohio App. Lexis 5665 at *7 (Ohio Ct.App. 1995) [considering officer's post-stop actions, including bringing drug sniffing dogs to scene]; *City of Dayton* v. *Erickson*, 1995 Ohio App. Lexis 999 at *8 (Ohio Ct.App. 1995) [considering officer's statement he originally intended to stop car on suspicion driver was unlicensed where stop was for signal violation]; *State v. Blumenthal*, 78 Wash.App. 82, 86, 895 P.2d 430, 435 (Wash.Ct.App. 1995) [considering, inter alia, whether officer followed car for an unreasonably long time, and whether assigned to a duty in which traffic stops would be unusual]; *State v. Marshall,* Utah Adv.Rep. 45, 791 P.2d 880, 883 (Utah Ct.App. 1990) [taking into account that officer "was not suspicious of [the driver] for other reasons before the stop, had not followed him in order to find some reason to pull him over, and, before the alleged violation occurred, had not radioed for help"]; *State v. Bishop*, 95 Ohio App.3d 619, 622, 643 N.E.2d 170, 172 (Ohio Ct.App. 1994) [considering, inter alia, that officer followed car before seeing violation and did not issue citation for traffic offense].

Some courts applying the test have even ignored testimony that the officer complied with his usual practice and ruled the stop invalid based solely on a gut belief that the stop was a pretext. *See State v. Lakes*, 1995 Ohio.App. Lexis 5274 (Ohio Ct.App. 1995); *State v. Haskell*, 645 A.2d 619 (Me. 1994).

Even among courts that decide the case based on whether the officer complied with routine or usual practices,

there is disagreement over the relevant reference group. For example, numerous courts have decided the propriety of an alleged pretextual stop by looking at what is the individual officer's *own* usual practice. *See, e.g., United States v. Werking*, 915 F.2d 1404, 1408 (10th Cir. 1990); *United States v. Bates*, 840 F.2d 858, 860 (11th Cir. 1988); *State v. Izzo*, 623 A.2d 1277, 1280 (Me. 1993); *State v. Hunter*, 107 N.C. App. 402, 420 S.E.2d 700, 703 (N.C. Ct.App. 1992). Yet, other courts have viewed the ordinary practices of the investigating officer as insignificant. *See United States v. Greenspan*, 26 F.3d 1001, 1005 (9th Cir. 1994); *United States v. Fernandez*, 18 F.3d at 87; *United States v. Guzman*, 864 F.2d 1512, 1518 (10th Cir. 1988). Similarly, some courts define the reasonable officer by considering what officers in the same *unit* would do. *See United States v. Fernandez*, 18 F.3d at 877. While other courts take into consideration what officers in the same *state* would do. *See United States v. Guzman*, 864 F.2d at 1518. In *United States v. Robles-Alvarez*, 1996 U.S. App. Lexis 1518, (9th Cir. 1995), the court held that, so long as traffic enforcement was within the scope of the particular officer's scope of duties, his actions were to be measured against what a reasonable police officer *in general* would do, as opposed to what a reasonable officer in the same unit as the investigating officer would do.

In addition, courts using the "would have" test have taken different approaches regarding the extent of the inquiry that may be made in adducing what is standard or routine practice. Some courts suggest it be done in a cursory fashion. *See, e.g., State v. Chapin*, 75 Wash.App. 460, 468 n. 16, 879 P.2d 300, 305 (Wash Ct.App. 1994) [noting that the officer's testimony as to the standard practice should suffice]. Other courts have permitted extensive research into the practices of the arresting officer or officers in the same unit as the arresting officer. *See, e.g., United States v. Fernandez*, 18 F.3d at 877 [evidence introduced that investigating officer made 63 warning stops for tinted windows; another officer in unit issued no warnings, two other officers issued one

warning, one officer issued three warnings, and one officer issued 20 warnings]; *United States v. Wilson*, 853 F.2d 869, 875-876 (11th Cir. 1988) [records of all investigative activity of arresting officer and expert study on how fast vehicles travel on freeway introduced into evidence].

Because the "would have" test lacks a functional definition, should this Court chose to adopt the test, many of the following questions will have to be considered:

Is the "would have" approach a "totality of the circumstances" test or is it primarily a question of whether the officer was following standard practices?

If the test is a "totality of the circumstances" test, what factors may be considered? Should all the factors be given the same weight? If not, what factors should be given the most weight?

Should the court take into consideration factors bearing on the officer's subjective intent? Should it consider whether the officer was pursuing an investigation of the driver before making the stop? Should the court consider how long the officer followed the driver before observing the violation? Should the actions of the officer after the stop is made be considered? Should it matter whether the officer actually issued a citation for the violation? Is the officer's statement that he would not have made the stop absent an intent to investigate relevant?

If the test is primarily a question of whether the officer was following standard practice, is the officer's own individual practice relevant to determining whether the stop was pretextual? If so, is an officer's own practice more important than what the standard practice is for other members of his department?

Is the reference group for deciding what is the standard practice the specific unit to which the officer is assigned? Members of the same unit who patrol the same beat? Members of the same unit who patrol similar beats? The entire police department? Members of the police department who patrol similar beats? All police departments

in the same judicial district? All police departments in the same county? Or all police departments in the state?

If the arrest is made by a member of a statewide police department, is the reference group all state patrol officers? Just state patrol officers in the same station? Or state patrol officers in the same geographical division?

If the arrest is made by a member of federal law enforcement (i.e., the FBI, ATF, or DEA), is the reference group all federal law enforcement members? All members of the particular branch? All members stationed in the state where the stop occurred? All members stationed in the same office? All members assigned to a particular subdivision? Or all members of a particular subdivision assigned to a particular office?

If the reference group is other members of the unit, how is a "typical officer" to be defined? Is the stop deemed reasonable if most other members of the unit would have made the stop? If a substantial number of other members would have made the stop? If at least one other officer in the unit would have made the stop?

What happens if a minority of the members of the same unit would not have made the stop, but a majority of the members of the same department would have made the stop? Or vice versa?

Is the relevant group other members of the unit who have been on the force a comparable time? What happens if it is typical for rookies to make more traffic stops? Is the officer judged against the typical officer in his unit or against other rookies in the unit?

Does it make a difference whether the normal practice is to make such a stop at night or must the standard be defined by what normal practice is during the day?[4]

Does it make a difference at what point in an officer's

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[4]*See State v. Haskell*, 645 A.2d at 621 [pretext found where speeder stopped in early morning though officer testified he normally makes such stops late at night but not during the afternoon].

shift the stop takes place? What if a stop for a particular violation is made at the end of a shift and it is usual to make such stops, except when it is near the end of the shift?[5]

Can weather conditions factor in? Can the type of neighborhood factor in? Can the day of the week, week of the month, or month of the year be taken into consideration?

Can an officer who is off-duty ever be deemed to be acting according to standard practice?[6]

If a special unit was created by a local police department to engage in strict enforcement of the traffic laws as part of an overall strategy of drug interdiction[7], would alleged pretextual traffic stops by members of this unit be judged against the standard procedures of the entire department or the special unit?

What if the officers involved in the seizure belong to a task force using members from more than one agency?[8] What result if more than two officers make the stop?[9]

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[5]*See United States v. Millan*, 36 F.3d at 889 [magistrate took into account that stop for minor safety violation was made by officers "en route to their offices at the end of the workday" in finding pretext].)

[6]*See State* v. *Arroyo*, 102 Utah Adv.Rep. 34, 770 P.2d 153, 155 (Utah Ct.App. 1989) [finding pretext where officer making stop was off-duty].

[7]*See, e.g., United States v. Dunson*, 940 F.2d 989, 990-993 (6th Cir. 1991), *cert. denied*, 503 U.S. 941 (1992).

[8]*See United States v. Scopo*, 19 F.3d at 778 [where a suspected member of a criminal organization, was stopped for a traffic violation by surveillance officers belonging to a joint task force comprised of federal and local officers created to investigate the criminal organization and there was testimony that while task force members did not usually effect traffic arrests, part of their typical duties during a surveillance was to issue traffic summons].

[9]*See United States v. Greenspan*, 26 F.3d at 1003 [where one officer testified it was policy for state police to stop all speeders and he consistently stops speeders going 9 mph over the limit except when everybody in the flow of traffic going more than 9 mph over the limit and partner testified that he

Could a police department make it standardized procedure for officers to give priority to stopping those traffic violators who are suspected of more serious criminal activity?

What information is the defendant entitled to obtain in preparing for the motion to suppress? Standard policy manuals? Records concerning the number and kinds of citations issued by the individual officer? Records concerning the number and kinds of citations issued by other members of the officer's unit? Records concerning the number and kinds of citations issued by other members of the officer's department? Are each, or any, of these records relevant in deciding what is the standard practice? To what extent would these records be admissible?

Should the "would have" approach be limited to stops for "minor traffic offenses"? If so, what constitutes a "minor traffic violation"?

Are all infractions to be deemed minor offenses or can a misdemeanor be a minor offense? Will some infractions not be minor offenses?

Will some violations of the same infraction be deemed "minor" and others not? Will it be a "minor" violation to drive one mph but not ten mph over the speed limit?[10] Will it make a difference how far a person weaves out of the lane?[11]

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would not issue to speeding tickets to persons speeding 0-3 mph over the limit if that was speed of traffic flow].

[10]*Compare State v. Haskell*, 645 A.2d at 619 [pretext found where driver stopped for going 4 mph in a 55 mph zone] *with United States v. French*, 974 F.2d 687, 691-692 (6th Cir. 1992), *cert. denied*, 506 U.S. 1066 (1993) [no pretext found where car driven 7 mph over the speed limit in 65 mph zone].

[11]*Compare United States v. Lyons*, 7 F.3d at 976 [finding stop pretextual, as matter of law, where officer stopped driver on suspicion of DUI based, in part, on weaving within lane 3-4 times] *with United States v. Perez*, 37 F.3d at 513 [no pretext because even officers in drug interdiction unit would pull

If there is no line to be drawn between infractions and misdemeanors, does the court have to weigh the seriousness of the violation?[12]

In sum, while many courts claim to be using the "would have" approach, few actually venture into the quagmire of its practical application or engage in the type of review the standard truly demands.

B. The "Purely Objective" Approach Provides the Police with a Measure of Discretion That is Essential to Effective Law Enforcement: The "Would Have" Test Deprives the Police of this Essential Discretion

Petitioner complains that the use of automobiles is so heavily regulated "that it is impossible to operate them in strict conformity with each and every applicable regulation" *Petitioner's Brief on the Merits* at 21. Yet he expects police departments to develop standardized procedures for each of these numerous situations. Given the varied factual settings and different types of offenses, this is an unrealistic expectation.

> Common sense suggests that an officer may observe a large number of traffic violations in a given day and must make a choice as to which violators to stop and which ones not to stop. Any number of factors -- including legitimate policy considerations -- could influence an officer's decision to make a particular stop.

United States v. Fernandez, 18 F.3d at 889 n. 7 (Brown, J., dissenting). "Unlike a standard policy for inventory searches,

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over driver weaving back and forth across fog line].

[12]*See State v. Whitsell*, 591 N.E.2d at 273 [noting a police officer might overlook broken taillight but not a missing license plate].

situations concerning stops and arrests are not so readily standardized." (*Garcia v. State*, 827 S.W.2d 937, 942 (Tex.Crim.App. 1992). Rather, police departments give officers wide discretion to decide when, where, how, and who to stop.

To require police departments to adopt standardized policies comparable to those existing in the area of inventory searches would not only be next to impossible, it would be detrimental. Giving an officer a wide range of discretion in choosing how to best utilize his time and efforts in preventing crime is beneficial. We "'want officers to maximize their resources (including their activities within the Fourth Amendment) in pursuit of serious offenders.'" *State v. Lopez*, 237 Utah Adv.Rep. 9, 873 P.2d 1127, 1140 (Utah Ct.App. 1994).[13]

For example, it seems eminently reasonable to allow officers the option of enforcing the traffic laws, in a more restrictive fashion than is the usual practice, during those periods of the night when they are more likely to catch a drunk driver by doing so. Yet, under the "would have" test, this deviation in practice can render the stop invalid. *See State v. Haskell*, 645 A.2d at 619-622. Similarly, it seems both reasonable and good policy to give homicide detectives the discretion to serve outstanding non-homicide arrest warrants in order to increase their chances of solving a murder, even if serving such warrants is outside the scope of their normal duties. *See, e.g., People v. Hattery*, 183 Ill.App.3d 785, 817, 539 N.E.2d 368, 390 (Ill.App.Ct. 1989); *State v. Woods*, 117 Wis.2d 701, 712-713, 345 N.W.2d 457, 463-464 (Wis. 1984); *Aultman v. State*, 621 So.2d 353, 361 (Ala.Crim.App. 1992), *cert. denied*, 126 L.Ed.2d 354 (1993); *State v. Blair*, 691 S.W.2d 259, 262 (Mo. 1985), *cert.*

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[13]Moreover, even if such standardization of procedures for enforcement of traffic laws would be possible, such standardization would more likely be dictated by budget considerations than by what a police department necessarily believes to be the ideal operating procedures.

granted, 474 U.S. 1049, *dismissed*, 480 U.S. 698 (1987). Yet, under the "would have" approach, such behavior is condemned as unreasonable. *See United States v. Causey*, 834 F.2d 1179, 1186 (5th Cir. 1987) (Rubin, J., dissenting) [finding it unreasonable for officers to use old bench warrant to arrest robbery suspect].)

C. The Purely Objective Test is Consistent with this Court's Traditional Approach to Assessing the Constitutionality of Limited Seizures That Are Supported by Objective Facts Establishing a Requisite Level of Criminal Suspicion: The "Would Have" Test is an Unwarranted Departure From this Approach

1. Using the "Purely Objective" Approach in the Context of Alleged Pretext Stops is Consistent with this Court's Objective Approach to Assessing the Constitutionality of Searches or Seizures in Analogous Contexts

Over the past two decades, this Court has made it clear that the subjective intent of a police officer, engaged in a search or seizure for purposes of criminal investigation, is irrelevant where there are objective circumstances establishing the requisite level of suspicion. *See Horton v. California*, 496 U.S. 128, 131 (1990); *Maryland v. Macon*, 472 U.S. 463, 470 (1985); *United States v. Hensley*, 469 U.S. 221, 234-235 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 583-584 n. 3 (1983); *Scott v. United States* (1978) 436 U.S. 128, 137.

The rationale behind this focus on objective facts is easily understood:

> The scheme of the Fourth Amendment becomes meaningful only when it is assured

> that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Scott v. United States, 436 U.S. at 137, *quoting Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). This evaluation cannot effectively be accomplished if courts are forced to rely "on standards that depend upon the subjective state of mind of the officer." (*Horton v. California*, 496 U.S. at 138.)[14]

This rationale is also consistent with those cases holding that an officer's good faith subjective belief cannot ***save*** a search or seizure that is not supported by objective circumstances establishing the requisite level of suspicion. *See, e.g., Beck v. Ohio*, 379 U.S. 89, 97 (1964). After all, if an officer's subjective beliefs cannot turn a "good" seizure into a "bad" seizure why should his subjective beliefs be able to turn a "bad" seizure into a "good" seizure? *Cf., Graham v. Connor*, 490 U.S. 386, 397 (1989) ["officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's

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[14]Even when this Court has expressed concern over the abuse of police authority, it has not authorized courts to examine the state of mind of the investigating officer. For instance, in *Steagald v. United States*, 451 U.S. 204 (1981), this Court observed that if officers were allowed to serve arrest warrants for suspects in the homes of the third parties, it could lead to abuses by police seeking to search for illegal activity. *Id.*, at 215. However, this Court did not address its concern by authorizing courts to explore the state of mind of the officer serving the arrest warrant for hints that the warrant was being used as a means to surreptitiously search the house for evidence of an unrelated crime. Nor, for that matter, did it adopt a variation of the "would have" test (i.e., "would a reasonable officer have executed the warrant at the third party's residence in the absence of an ulterior motive"). Instead, this Court confirmed its rejection of a subjective approach by simply making a hard-line rule against police engaging in searches of residences pursuant to arrest warrants for non-residents. *Id.*, at 205.

good intentions make an objectively unreasonable use of force constitutional"].

In keeping with this Court's mandate, the "purely objective" test eliminates the necessity of inquiring, explicitly or implicitly, into an officer's subjective state of mind.

On the other hand, the "would have" test contravenes this principle. Close scrutiny of the "would have" approach reveals its ultimate purpose and effect is to inquire into the subjective state of mind of the officer actually making the stop. (*See United States v. Johnson*, 63 F.2d 242, 247 (3rd Cir. 1995), *pet. for cert. filed*, (1995); *United States v. Scopo*, 19 F.3d at 782. For example, in *United States v. Smith*, 799 F.2d at 914, the court said, "what turns this case is the overwhelming objective evidence that [the officer making the stop] had no interest in investigating drunk driving charges". But it is nigh impossible to draw a meaningful distinction between the subjective motivation of the police officer and the "objective evidence" of the "officer's actual interest in investigating the kind of offense for which he made the stop[.]" *United States v. Ferguson*, 8 F.3d at 391; *State v. Lopez*, 873 P.2d at 1138.

In substance, the "would have" approach just creates an irrebuttable presumption of "bad faith" whenever the officer acts outside the scope of what the court, in hindsight, deems to be the actions of a typical officer assigned to the same precinct and duties as the officer making the seizure. (*See United States v. Rusher*, 966 F.2d 868, 886 (Luttig, J., concurring) (4th Cir. 1992), cert. denied, 506 U.S. 926 (1992) [noting "would have" approach is a "subjective" standard "because it is fundamentally a rule that requires invalidation of objectively reasonable law enforcement actions, if by operation of the rule, the law enforcement officer is deemed to have acted out of pretextual motives"].

Even those courts which look strictly at whether the investigating officer followed usual departmental practices are still primarily attempting to penalize the actual officer making the stop for acting with an "unacceptable intent." *See United*

States v. Fernandez, 18 F.3d at 889 (Brown, J., dissenting) [noting that examination of the number of citations issued for the offense in question by members of the arresting officer's same unit is "in actuality nothing more than an inquiry into [the officer's] subjective state of mind when he made the decision to stop"].) Indeed, if punishing the officer for an improper subjective motivation is ***not*** actually the concern of the "modified objective" test, why does it matter whether another "hypothetical reasonable officer" would have made the stop absent such improper motivation? The real reason for considering normal practice and procedures is because "an improper or pretextual motive may be inferred where there is a discernible departure from them." *State v. Chapin*, 897 P.2d at 304; *State v. Blumenthal*, 895 P.2d at 433, n. 12;

2. The Purely Objective Approach is Consistent with the Test Adopted in *Terry* for Assessing the Constitutionality of Limited Seizures

Using the "purely objective" approach in the context of assessing the constitutionality of alleged pretextual traffic stops is also consistent with this Court's traditional approach to analyzing the propriety of limited seizures. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984); *United States v. Cortez*, 449 U.S. 411, 418 (1980); *Terry v. Ohio*, 392 U.S. at 22-23. Petitioner and allied amici contend that the standard adopted in *Terry*, ("would the facts available to the officer at the moment of seizure or search 'warrant a man of reasonable caution in the belief' that the action was appropriate"), lends support to their position that it is appropriate to look at factors other than whether there was sufficient objective evidence of criminality. They are wrong.

In *Terry*, this Court was not concerned with the question of whether an officer should or should not be investigating a particular type of crime. This Court was concerned with establishing the principle that the officer's

subjective state of mind is irrelevant in deciding whether the police action was reasonable, i.e., did the objective facts support a suspicion of criminal activity regardless of an officer's subjective good faith belief. *Id.*, at 22.

This Court did not specifically state what factors should be used in assessing whether a challenged police action was reasonable, but the only types of factors this Court actually took into account were (i) facts suggesting the suspects were engaged in criminal activity, (ii) facts suggesting the suspects presented a risk to the officer, and (iii) the manner in which the search and seizure was conducted, e.g., whether the scope of the search or seizure was related to the justification for the act's initiation. ***No*** mention was made that it would be appropriate to look at the types of factors used in the "would have" test such as (i) whether the officer would "routinely" have made the stop or (ii) the kind of duty the investigating officer was on at the time of the stop.[15]

This Court did not suggest that the exercise of the discretion to make a seizure based on objective circumstances showing unlawful activity is subject to constitutional scrutiny. The cases of *Wilson v. Arkansas*, 131 L.Ed.2d 976 (1995), *Tennessee v. Garner*, 471 U.S. 1 (1985), *Winston v. Lee*, 470 U.S. 753 (1985), and *Welsh v. Wisconsin*, 466 U.S. 740 (1984), relied upon by petitioner for the proposition that this Court will look beyond the existence of probable cause in assessing the reasonableness of a seizure are inapposite. *Petitioner's Brief on the Merits* at 16. All of them are concerned with the manner in which a search or seizure is carried out. None of the cases authorize restricting the discretion of the police to *make* the search or seizure.

While this Court has not hesitated to strike down vague or overbroad statutes that are defined in a manner

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[15]Nor for that matter, did *Terry* hint that the subjective motives of the police officer would be relevant in assessing the constitutionality of the stop.

encouraging "arbitrary and discriminatory enforcement," *see Kolender v. Lawson*, 461 U.S. 352, 357 (1983), once a law is deemed to pass constitutional muster, the question of whether it should be enforced has not traditionally been one for the courts. "[C]ourts should leave to the legislatures the job of determining what traffic laws police officers are authorized to enforce and when they are authorized to enforce them." *United States v. Scopo*, 19 F.3d at 784; *United States v. Ferguson*, 8 F.3d at 391.

3. The "Purely Objective" Approach Limits Police Discretion in a Manner Implicitly Endorsed by this Court

We agree with the general proposition that the Fourth Amendment imposes a standard of "reasonableness" upon the exercise of discretion by government officials in order to guard against arbitrary invasions of privacy. *See Delaware v. Prouse*, 440 U.S. at 667; *United States v. Brignoni-Ponce*, 422 U.S. at 878. However, a traffic stop is not permitted unless the police can point to objective circumstances that establish a requisite level of suspicion. This requirement provides the necessary guard against arbitrary and indiscriminate seizures. The decisions in *Brignoni-Ponce* and *Prouse* implicitly recognize this proposition.

In *Brignoni-Ponce*, this Court decided the issue of whether roving patrols of border police could randomly stop vehicles when the only ground for suspicion was that the vehicle's occupants appeared to be of Mexican descent. This Court disapproved of such stops, stating that to allow such stops would subject individuals to "potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers." *Id.*, at 882. As a method of limiting the government's discretion, this Court required that there be reasonable suspicion that the vehicle contain illegal immigrants. This Court specifically held that the requirement of reasonable suspicion protected "residents

of the border areas from indiscriminate official interference." *Id.*, at 883.

In *Prouse*, this Court was faced with the question of whether to approve automobile stops for the purpose of checking licenses and registration where there was no reasonable suspicion that the car was being driven in violation of the law. *Id.*, at 650. Once again this Court voiced its concern that the discretion of the official in the field be "circumscribed, at least to some extent" and disapproved of the stop at issue. *Id.*, at 661. However, as in *Brignoni-Ponce*, this court only found the stop at issue to be unreasonable (i.e., lacking in safeguards against arbitrary government interference) because there was no requirement that the officer possess a requisite level of criminal suspicion. It was the ***absence*** of probable cause to believe that the driver was violating "any one of the multitude of applicable traffic and equipment regulations -- or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered" that rendered the stop unconstitutional. *Id.*, at 661.

Thus, this Court recognized that the risk of arbitrary enforcement is curtailed by the ability of the courts to invalidate searches or seizures which are not supported by objective facts establishing a violation of the law. It is only

> "[i]n those situations in which the balance of interests precludes insistence upon 'some quantum of individualized suspicion' [that] other safeguards are generally relied upon to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"

Id., at 664-665.

For example, this Court has been willing to consider alternative methods of curtailing the discretion of law enforcement in circumstances where governmental intrusions that need not be supported by some quantum of individualized criminal suspicion are permitted (i.e.,

inventory, regulatory, and border searches). These safeguards can take the form of restrictions on the scope of the search, requirements that the search be conducted pursuant to standardized or routine procedures, and/or, provisos that the searches must be conducted with at least *some* purpose to effectuate the ostensible purpose of the search. *See, e.g., Skinner v. Railway Labor Exec. Assn,* 489 U.S. 602 (1989) [allowing drug testing of railway employees absent reasonable suspicion because, inter alia, the circumstances justifying tests and permissible limits of the intrusion were "defined narrowly and specifically in the regulations that authorize them"]; *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) [stopping cars at border checkpoints without reasonable suspicion of criminal activity permitted because done at fixed locations not designated by individual officers and under set regulations and limits]; *Florida* v. *Wells,* 495 U.S. 1 (1990) [opening of containers in inventory search permitted so long as standardized criteria or established routine exists to prevent use of exception for purposes of general rummaging].)[16]

But it is ***because*** these type of searches are free from the traditional impediments imposed by the Fourth Amendment against unreasonable searches and seizures that courts are permitted to look at other factors that can limit discretion. *See Delaware v. Prouse*, 440 U.S. at 663. When the police are constrained by the bulwark of individualized suspicion of criminal activity, it is redundant to require that the officer's decision to enforce a violation of law also conform to a hypothetical norm.

Moreover, it should also be kept in mind, that a traffic

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[16]While inventory searches sometimes *follow* a seizure that must be supported by a requisite level of criminal suspicion, they are often conducted without there being any suspicion of criminal activity on the part of the owner of the property searched (i.e., an abandoned car may be impounded and inventoried). In such circumstances, this Court has found it unhelpful to apply the standards used in assessing criminal investigations. *See Colorado v. Bertine*, 497 U.S. 367, 371 (1987).

stop is a very limited intrusion. A "traffic stop is presumptively temporary and brief." *Berkemer v. McCarty*, 468 U.S. at 437. Once a traffic stop is made, it does not, by itself, provide justification for further investigation. The scope of the stop "must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500 (1983). Thus, an officer may subjectively harbor a cornucopia of suspicions regarding the person he has detained but he cannot lawfully arrest the individual, conduct a general search, or do any of the things petitioner and allied amici are so worried about, unless there exists objective circumstances supporting each new level of intrusion. *Cf.*, *Horton v. California*, 496 U.S. at 139-140 [discarding of inadvertence requirement does not allow police to conduct general searches because, *inter alia*, a warrantless search must "be circumscribed by the exigencies which justify its initiation"].

Finally, restrictions on the scope of police authority during a traffic stop may also be imposed by state legislatures. *See, e.g.*, Cal. Pen. Code, § 853.5 [narrowing ability of officers to take persons arrested for infractions into custody]; Cal. Health & Saf. Code, § 11357(b) [narrowing ability of officers to arrest for misdemeanor possession of marijuana]; Cal. Veh. Code, § 40302 [narrowing ability of officers to make custodial arrests for most violations of the Vehicle Code]; Cal. Veh. Code, § 27315, former subd. (k) [deleted 1992: preventing detention of drivers solely for failure to wear seat belts]; *State v. Chapin*, 879 P.2d at 303 [noting decriminalization of most minor traffic offenses and prohibition against custodial arrest for such offenses unless defendant refuses to sign promise to appear].

4. The "Would Have" Test Carves Out a Special Rule for Inhibiting Police Discretion in the Context of Traffic Stops that Cannot Logically Be Limited to Traffic Stops

Petitioner argues that the "would have" test is needed

to curtail police discretion in the enforcement of traffic laws. Petitioner implies that the nature of traffic enforcement is somehow unique, and contrasts the enforcement of traffic laws with the enforcement of laws governing pedestrians. (*Petitioner's Brief on the Merits* at 22.)

However, from a theoretical standpoint, it will be difficult to limit the test to stops for traffic violations. Many of the same concerns about subterfuge and use of police powers for discriminatory purposes are present in other contexts.[17] In fact, courts have applied or contemplated applying a "would have" type analysis in a variety of different contexts including: where the suspect is detained for a non-traffic infraction, *see United States v. Mota*, 982 F.2d 1384, 1388 (9th Cir. 1993); where the suspect is arrested on a misdemeanor warrant, *see United States v. Causey*, 834 F.2d at 1179-1184; where the suspect is arrested on a felony warrant, *see State v. Towne*, 158 Vt 607, 627-630, 615 A.2d 484, 496-498 (Vt. 1992); where the suspect is arrested on a probation revocation warrant, *see State v. Everett*, 472 N.W.2d 864, 867 (Minn. 1991); where the suspect is arrested on a parole hold, *see State v. Archuleta*, 209 Utah Adv.Rep. 12, 850 P.2d 1232 (Utah 1993), *cert. denied*, 114 S.Ct. 476 (1993); where a home is searched in conjunction with an arrest on a warrant, *see State v. Jeney*, 163 Ariz. 293, 296-297, 787 P.2d 1089, 1091 (Ariz.Ct.App. 1987); and where a home is entered to arrest for a felony under exigent circumstances, *see United States v. MacDonald*, 916 F.2d 766, 770-772 (2nd Cir. 1990), *cert. denied*, 498 U.S. 1119

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[17]For example, police officers in large cities are given the discretion to decide which of hundreds or thousands of outstanding felony warrants should be served. *See, e.g., United States v. Causey*, 834 F.2d at 1190 (dissenting opinion, Rubin, J.) [noting that in 1986, there were 1,500 outstanding felony warrants in Indianapolis alone]. An officer who makes his decision to serve a warrant based on racial animus or other improper motive subjects the person named in the warrant to an even greater "arbitrary" intrusion than the person detained for a traffic offense.

(1991).

On the other hand, if the "would have" approach *is* limited to stops for "minor" traffic offenses, it will result in a strange paradox: the most *de minimus* of seizures being subjected to the greatest level of scrutiny.

5. The "Purely Objective" Approach Does Not Preclude Challenges to Discriminatory Enforcement of the Law.

The fear of discriminatory enforcement of the law is a genuine fear. The argument that use of a "purely objective" approach will allow police to selectively focus on individuals based on race or ethnicity is the most persuasive, albeit not conclusive, argument put forth by petitioner and allied amici. But there are a number of reasons why it is unnecessary to adopt the "would have" or other subjective-type approach in order to address the problem of discriminatory enforcement.

First, regardless of which approach is adopted by this court, it will and should always remain unconstitutional to detain a person simply because that person belongs to a particular racial or ethnic group. *See United States v. Brignoni-Ponce*, 422 U.S. at 886-887; *United States v. Fouche*, 776 F.2d 1398, 1402 (9th Cir. 1985), *cert. denied*, 486 U.S. 1017 (1988).

Second, even if a person's ancestry is not the only reason for a detention, an individual may still be entitled to redress if the detention is part of a concerted police effort to harass citizens based on invidious discrimination. *Cf.*, *United States v. Martinez-Fuerte*, 428 U.S. at 1133 n. 19 ["upon a proper showing, courts would not be powerless to prevent the misuse of checkpoints to harass those of Mexican ancestry"].

Third, states can enact legislation addressing the problem of discriminatory enforcement of the laws by the police. For example, in Minnesota, the Human Rights Act protects citizens against unfair discriminatory police practices. (*See*, Minn. Stat. § 363.03, subd. 4.) Citizens can bring suit

against the police for violations of the Act. Such a suit can be based on an allegation that a detention was conducted for racially-motivated purposes. *See State v. City of Mounds View*, 518 N.W.2d 567, 571-573 (Minn. 1994). Significantly, the Minnesota Supreme Court has held that in determining whether a traffic stop, allegedly conducted for racially-motivated purposes, violates the Human Rights Act, courts *can* consider whether the police acted in bad faith. *Id.*, at 572. Indeed, even investigatory stops that are deemed ***reasonable*** seizures under the Fourth Amendment will violate the Act if used as a "pretext for the malicious harassment of minorities." *Id.*, at 572 n. 9.

Fourth, the Equal Protection and Due Process clauses potentially provide grounds for suits against police officers who misuse their authority and engage in discriminatory enforcement of the law. *See United States v. Rusher*, 966 F.2d at 889 (Luttig, J., concurring and dissenting) [expressing concern that traffic stops may involve arbitrary abuses of governmental power, but noting due process clause and, where appropriate, the equal protection clause "constitute adequate protection and remedy against such abuses of the public's trust"]; *Shaw v. California Department of Alcoholic Beverage Control*, 788 F.2d 600, 610-611 (9th Cir. 1986) [former tavern owners have civil action against police department for racially discriminatory enforcement of the law in violation of equal protection]. As pointed out in the concurring opinion of Justice Newman in *United States v. Scopo*, 19 F.3d at 785:

> [T]he Equal Protection Clause still imposes restraint on impermissibly class-based discriminations. '[I]f [the law] is applied and administered by public-authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the

> Constitution.' *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-1073, 30 L.Ed. 220 (1886). . .. Police officers who misuse their authority [under the 'purely objective' approach] may expect to be defendants in civil suits seeking substantial damages for discriminatory enforcement of the law.

Fifth, the Equal Protection clause prohibits government from selectively prosecuting individuals based on race, religion, or other arbitrary classifications. *See Wayte v. United States*, 470 U.S. 598, 608 (1985).

Sixth, citizen boards and internal police department investigations can act as a check on racially discriminatory behavior of individual police officers.

For these reasons, the fear of discriminatory enforcement need not be the unfortunate catalyst for an unnecessary and unwarranted structural change in Fourth Amendment law.

CONCLUSION

This Court should uphold the decision of the court of appeal by adopting the only workable standard for analyzing the constitutionality of traffic stops: the "purely objective" approach. This Court should not add a new and unnecessary level of scrutiny to its traditional standard of review when deciding the propriety of limited seizures.

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